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No. 02-563

In the

Supreme Court of the United States

AMERICAN COALITION OF LIFE ACTIVISTS, ET AL.,

Petitioners,

v.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' RESPONSE TO BRIEF OF THE UNITED STATES AS AMICUS CURIAE

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ARGUMENT

The Solicitor General's amicus brief articulates no governmental interest in this case; it is largely an amicus brief for respondents, replicating their arguments, selective approach to the record,[1]/ and failure to dispute key point s.

Undisputed Points

The government's brief does not dispute any of the points that have brought this case to national attention and made it worthy of certiorari, including these:

- The Ninth Circuit's affirmance of the $120 million verdict and the injunction rests on nothing but a bare en banc majority's theory that *otherwise protected* political posters are "threats" solely because of their "Wanted-style" *format*. Pet. 7-9.

- The "Wanted-style format" was deemed threatening only because of a supposed "poster pattern" consisting of a grand total of two coincidental acts of anti-abortion violence committed by *non-parties* against doctors named in "similar" posters published earlier by still other *non-parties*.[2]/ Pet. 7-9, 12-13.

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[1]/ For example, the government claims petitioners "knew" their posters created "fear" because one petitioner, Charles Wysong, testified that of the "two things" defendants fear most, one is "having their picture put on a poster." SG 4. Like respondents, the government fails to mention the rest of Wysong's statement, which explains *why* doctors fear this: "They don't want to be *publicly known*." Tr. 1610. Indeed, the "Deadly Dozen" poster contains no pictures. L. 3. It is telling that in a case where "context" is supposedly crucial, both the government and respondents resort to out-of-context quotations. This is why the dissenters in the Ninth Circuit noted that there is no evidence petitioners threatened anyone with bodily harm. Pet. 54a-56a.

[2]/ Respondents conceded that there is *no evidence* that a third act of violence against an abortion doctor named in a poster, Dr. Patterson, who was killed in an apparent robbery attempt, had anything to do with anti-abortion activity. Pet. 8, 55a.

- Hundreds of other posters of abortion doctors, including petitioners' two posters, have been followed by no violence whatsoever. Pet. 8.

- In the entire history of the use of posters condemning abortion doctors, exactly one person involved in poster-making—Paul Hill—is known to have committed violence against an abortion doctor. Pet. 55a.

- The Ninth Circuit's "format" theory was never given to the jury or followed by the trial judge, who both punished the posters without limitation to "format."[3]/

Further, the government does not dispute that political speakers have no way of knowing what "Wanted-style format" means. Petitioners' posters do not even contain the word "Wanted," and the en banc majority declared that "differences in caption or words are immaterial." Pet. 39a. *The verdict and the injunction thus hinge entirely on a forbidden "format" that has never been defined.* The government does not dispute that the Ninth Circuit's vague, *ad hoc* ruling has effectively criminalized *all existing and future posters* condemning named abortion doctors. Pet. 20-21. What anti-abortion activist would now gamble on passing the "Wanted-style format" test?

Finally, the government does not dispute that the Ninth Circuit has also punished *five other forms of political expression* tenuously linked to the posters:

- A list of doctors' names on a website, deemed a threat *only* when read "in conjunction" with the "wanted-style format" of posters naming the same doctors. Pet. 9; L. 19-21.[4]/

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[3]/ The government argues that this well-founded claim of error, "whether or not meritorious, is wholly without significance outside this case." SG 19. In other words, the government urges this Court to overlook a fundamental deprivation of due process in a case with national First Amendment implications.

[4]/ The government does not dispute that the doctors' list was created by non-party Neal Horsley, *after* petitioners' organization was removed from his site. Pet. 3-4.

- An editorial in *Life Advocate* magazine, defending ACLA's "Deadly Dozen" poster (but not reproducing the actual poster "format"), presented to the jury as a "republication" of the "threat." Pet. 9; L. 11-12.

- A *Salt and Light* newsletter article providing a thumbnail reproduction of the poster and explaining that it was not a "hit list" as the political opposition had claimed. This was likewise presented to the jury as a "republication" of the "threat." Pet. 9; L. 7-9.

- Any undefined "equivalent" of ACLA's posters, republished "threats" in the magazine articles, or the verboten website content. Pet. 44a, 182a-183a.

- The publication in print or electronic form of *any* "personally identifying information" concerning plaintiffs, *whether or not it appears in a "wanted-style format poster."* Pet. 44a, 183a.

These undisputed points demonstrate an unheard-of invasion of First Amendment liberty that has provoked law review commentaries, years of national press coverage, and a call for the Solicitor's General's opinion. It is astonishing that the government claims this case presents no question of national importance. SG 10.

The Government's Discussion of Virginia v. Black

In *Virginia v. Black*, 123 S. Ct. 1536 (2003), this Court held cross burning can be proscribed by a criminal statute that requires *specific intent* and proof of guilt *beyond a reasonable doubt*. This Court so held *only* because "[b]urning a cross in the United States is inextricably intertwined with the history of the Ku Klux Klan," 123 S. Ct. at 1544, and with *the Klan's* innumerable acts of murder, arson, and mutilation after the burning of crosses *by Klan members*. *Id.* at 1544-47. Based entirely on an "inextricably intertwined" and "indelible" association between cross burning and violence by "the *person who burns the cross*," this Court found that a burning cross can constitute a "true threat," even if today the cross burner might not be a member of the Klan. *Id.* at 1544-46 (emphasis added, here and throughout).

In discussing *Black*, the government contends three acts of *unrelated* violence created a "sufficiently strong" association between posters and violence to make "wanted-style posters" a per se threat. SG 14-15. The analogy to *Black* is untenable, for it is undisputed that in the entire history of the pro-life movement *one* person involved in making posters condemning abortion doctors—Paul Hill—later committed violence against an abortion doctor. Pet. 55a. With the exception of Hill, there is *no* history of violence against abortion doctors *by the makers of posters*, much less an "indelible" and "intextricably intertwined" history. On the contrary, poster-makers—including the petitioners—have *refrained* from violence.

Moreover, unlike cross burning, "Wanted-style poster" eludes definition. The concept is no more constitutionally supportable as a basis for restricting speech than would be a Virginia statute banning "cross burning-style" activity.

Finally, unlike cross burning, whose communicative content is minimal, "the posters and website are all public presentations on a matter of current moral and political importance; they provide information to the public... and propose a—peaceful, legal—course of action..." Pet. 75a (Berzon, dissenting). Punishment of such speech is unprecedented.

The Ninth Circuit's decision is thus clearly in conflict with *Black*. What the government is really arguing—contrary to *Black*—is that any form of political expression can be converted into a "threat" if its use is followed only two or three times by violence, *even if there is no history of violence by those who have employed that form of expression.*

The government, citing only *Black*, claims there is "nothing novel about a court's considering, as part of the context in which a communication was made, whether previous *similar communications* were followed by violence." SG 14. But the result in *Black* depends precisely upon a close—indeed, a unique—connection between a *specific, clearly definable form* of expressive conduct and a century of *imminent* violence *by those who used that precise form of expression.*

Ranging far beyond *Black*, the government suggests that a speaker must now make sure, not only that his or her mode of expression was never followed by violence, but also that "*similar communications*" in the past were not followed by violence, even *unrelated* violence, only two or three times. What does "similar

communications" mean? How is any political speaker to avoid liability under this standard? *Black* lends no support to this bizarre theory, nor does any other reported case in United States history, except this one. The government endorses precisely the novel threat to First Amendment liberty remarked by the five dissenters: "In this case, defendants *said nothing remotely threatening*, yet they find themselves crucified financially. Who knows what other neutral statements a jury might imbue with a menacing meaning based on the activities of unrelated parties." Pet. 68a-69a.

Blurring the Distinction Between "Intimidation," "Incitement" and "Threat"

Black holds that only *threats of force* constitute "[i]ntimidation in the constitutionally proscribable sense." 123 S. Ct. at 1548. Unlike the Ninth Circuit, *Black* defines "true threats" as "those statements where the speaker *means* to communicate a serious expression of an *intent to commit* an act of unlawful violence to a particular individual or group of individuals." *Id.* That is, this Court has now, for the first time, made it clear that a true threat requires (1) a *statement*, (2) by which the speaker *means*, (3) to communicate the *speaker's* intention, (4) to *commit* violence.

Otherwise, intimidating political speech is *not* proscribable, as this Court made clear in its unanimous decision in *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982). *Claiborne* holds that even political rhetoric that "might have been understood as... *intending to create a fear of violence*" is protected, since "[s]peech does not lose its protected character...simply because it may embarrass others or *coerce* them into action." *Id.* at 910, 927.

Throughout its brief, however, the government wrongly equates "intimidate" with "threaten." SG 6, 7, 9, 11 n.3, 16. But the Freedom of Access to Clinic Entrances Act (FACE) itself only prohibits intimidation, defined as "apprehension of bodily harm," 18 U.S.C. § 248(e)(3), when intimidation is *caused by a threat of force*, and *not* otherwise. 18 U.S.C. § 248(a)(1). Like the en banc majority, the government ignores this distinction, arguing that "intimidating"—placing a person in apprehension of bodily harm —is "essentially identical" to threatening a person. SG 16.

The Circuit conflict on this point is shown in *Spitzer v. Operation Rescue*, 273 F.3d 184, 196 (2d Cir. 2001), a FACE case in which the Second Circuit recognized that

> a court must be sure that the recipient is fearful of the execution of the threat *by the speaker* (or the speaker's co-conspirators). Thus, generally, a person who informs someone that he or she is in danger from a third party has not made a threat, *even if the statement produces fear*.... The evidence adduced at the hearing contains many such statements that do not constitute threats *even though they may have increased the recipient's apprehension of harm*. Yet the District Court did not pay due attention to this difference.

The government's attempt to distinguish *Spitzer* on its facts, SG 13 n. 5, is mere obfuscation. The Ninth Circuit has done precisely what the Second Circuit rejected: equating a statement inducing apprehension of harm with a threat under FACE.

As the Second Circuit recognized, to ignore FACE's requirement that "intimidation" be *caused by* a "threat of force" is to allow the statute to devolve into a ban on disturbing speech or non-imminent incitement, rendering any statement that makes someone apprehensive of harm—from any source, at any time in the future—a "threat." In fact, the government explicitly claims that the posters are "threats" because they engender fear of harm "if *not at the speaker's hands* then at the hands of one who heard the threat." SG 18. But communications that arouse fear of violence committed by those who "heard" the communications fall into the category of incitement, not threats.

The government's discussion of *Black* practically concedes the posters do not meet the *Black* test for a "true threat," but are, at worst, a form of non-imminent incitement:

> Neither the posters nor the Nuremberg Files contained any explicitly threatening language. The physicians who were the subjects of the posters and the Nuremberg Files nonetheless feared for their safety, because the personal information and photographs[5/] *made them easily identifiable* and because three other physicians had been killed after they were *identified* in

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5/ This is one of several factual misstatements in the government's brief. The only respondent whose photograph appears in any of the communications is Dr. Crist, who is depicted in the poster condemning his activities. L. 5.

> *similar* posters.... [P]etitioners 'deliberately *identified*' the respondent physicians 'to intimidate them.'" SG 3-4, 7.

The focus on "identification" as the "threat" demonstrates this is a poorly disguised incitement case. Petitioners would hardly need to "identify" people *whose identity they already knew* in order for *petitioners* to threaten bodily harm. The government, like the Ninth Circuit, confuses incitement with threats, and threats with intimidation, thus radically breaking with the concept of a threat as a statement "where *the speaker* means to communicate...an *intent to commit* an act of unlawful violence..." *Black*, 123 S. Ct. at 1548. That is precisely the legal error identified by the five dissenters, Pet. 56a-58a, and the three-judge panel that reversed the verdict. Pet. 119a-125a.

The Issue of Specific Intent is Squarely Presented

The government does appear to acknowledge that the *Black* test requires a statement by which the speaker "*means* to communicate" an intention to commit violence—that is, specific intent to make a threat, SG 15 n. 6, but claims the question is not squarely presented here because the jury charge on FACE required the jury to find "an essentially identical intent to intimidate . . ." SG 16.

First of all, the government ignores the record. The jury was admonished that "Defendants' subjective intent or motive is *not the standard* that you must apply in this case" and that the jury need not "find that any of the defendants actually intended to threaten plaintiffs, so long as you find that a reasonable person would have foreseen that it would be understood to be threatening." Pet. 251a-252a. The district court even went so far as to instruct that "you must" find petitioners liable "*even if you believe that the defendants did not intend the statements to be threatening,*" so long as it was "foreseeable" that the posters would be "interpreted" as threats. Pet. 5, 251a Furthermore, the jury instruction deletes "intentionally" from FACE's language, as quoted by the government. SG 5; Pet. 253a-254a. The result was a pure negligence standard for defining "threats" in political posters.

Since the district judge instructed the jury that *subjective intent is not the standard* for threats in violation of FACE, it necessarily followed that "intimidation" need not be subjectively intended;

for the only kind of intimidation FACE prohibits is intimidation *by* a threat of force (absent actual force or physical obstruction), and the district court insisted that such a threat could—indeed *must* — be found *"even if you believe the defendants did not intend the statements to be threatening."* Pet. 251a. The government's pure speculation that the jury might have found specific intent despite this grossly defective instruction hardly avoids the issue. The dissenters recognized that this case *does* present the question whether specific intent was required by this Court's precedents—now including *Black*. Pet. 74a-87a.

At any rate, as discussed above, an intent to intimidate is *not* "essentially identical" to an intent to threaten bodily harm. If the government believes that "intimidation = threat," then this Court's review is all the more necessary, because that reading of FACE would make it unconstitutional under *Claiborne* and *Black*.

The En Banc Majority Failed to Follow Any Recognized Threat Standard

The dissenters did not disagree with the majority merely over whether its "correctly" stated "objective" threat standard was satisfied by the evidence. SG 9.[6]/ Rather, the dissenters objected that the majority *"utterly fails to apply its own definition...."* Pet. 53a. The majority never demonstrated the existence of a *"statement* which...would be interpreted...as a serious expression of intent to *inflict* bodily harm...." Pet. 28a; 53a. The majority abandoned this definition and found petitioners liable for posters "generating fear" over an illusory "pattern" based on past violence defendants had nothing to do with. No recognized threat standard supports this novelty.

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[6]/ The government vainly characterizes Judge Kozinski's entire dissent as a mere dispute over sufficiency of evidence. SG 11 n. 3. On the contrary, the dissenting opinion objects that the majority has impermissibly expanded legal liability for "threats" to statements that induce apprehension of violence by unrelated third parties, *contrary to this Court's precedents*. Pet. 56a-58a, 69a. This case presents pure questions of First Amendment law, arising from undisputed facts, not a debate over the *quantum* of proof.

Failure to Explain Away Other Conflicts

The government contends there is no conflict between the en banc decision and *Claiborne*, because in *Claiborne* there was no "context" to give Evers's statements a threatening meaning. SG 17. As the dissenters noted, however, there *was* a "context" of violence surrounding Evers's statements; but it did not matter anyway, because Evers's explicit references to violence required no "context" to be understood. Pet. 63a-64a. This Court itself noted that the statements "might have been understood as...*intending to create a fear of violence*...." 458 U.S. at 927. But it is precisely "creating a fear of violence" that the Ninth Circuit has equated with a threat. The government's "distinction" between this case and *Claiborne* is non-existent.

The government claims the imminence requirement of *Brandenburg v. Ohio*, 395 U.S. 444 (1969), does not apply because this is a "threat case." SG 16-17. The government begs the question. Petitioners were held liable because the "poster pattern" "generated fear" of violence that never happened. It did not matter to the majority *who* might do violence or *when* it would occur. Pet. 16. This is nothing but an attenuated incitement claim that the label "threats" cannot hide. Pet. Reply 5-6. The dissenters note the conflict with *Brandenburg*.[Z]/ Pet. 57a-61a, 69a.

The government inexplicably maintains that the en banc majority followed this Court's precedents on the heightened protection for public political speech, even though the majority *explicitly refused to accord such protection* in a "threat" case. SG 18; Pet.28a. The dissenters note the majority's abandonment of this Court's public/private distinction in speech cases. Pet. 52a-53a, 65a-68a, 72a-73a.

The government sees no conflict with *United States v. Kelner*, 534 F.2d 1020 (2d Cir. 1976), and claims "there is no reason to conclude the Second Circuit would reach any different result under that test...." SG 12-13. This speculation defies common sense. In the Ninth Circuit, protesters can be punished under

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[Z]/ The Solicitor General does not even mention the conflict with *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389 (2002), in which this Court found that "The Government has shown no more than a remote connection" between computerized images and sex crimes against children. *Id.* at 1403; Pet. 20; Pet. Reply. 7. Here, the government again endorses an unconstitutional theory of "pattern" liability for speech.

FACE for *any statement*, no matter how innocuous, if a "reasonable person" would foresee that the statement would be interpreted as a threat, Pet. 25a-28a, whereas in the Second Circuit protesters can be punished only for a statement that is "unequivocal, unconditional, immediate, and specific" and conveys a "gravity of purpose and imminent prospect of execution." *Kelner*, 534 F.2d at 1027. Judge Berzon recognized the Circuit conflict. Pet. 79a-87a.

An undefined poster "format" that "generates fear" over a "pattern" could not possibly meet the *Kelner* test. And in *Spitzer*, 273 F. 3d at 196-97, the Second Circuit, heightening the Circuit conflict, affirmed that *Kelner* applies to threat claims under FACE:

> Given the context, it is understandable that the clinic doctor feared for her safety... But excessive reliance on the reaction of recipients would endanger First Amendment values... [Defendant's] statement did not indicate the *"unequivocal immediacy* and *express intention," Kelner*, 534 F.2d at 1027, of a true threat....

CONCLUSION

This Court should grant the writ of certiorari.

Respectfully submitted,

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